

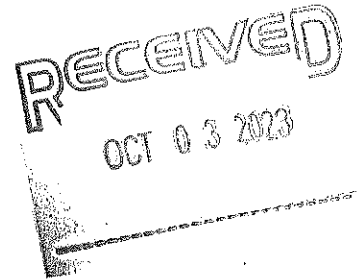
FARBER AND LINDLEY, LLC  
30 BOLTWOOD WALK - FRONT 101  
AMHERST, MASSACHUSETTS 01002-2187

LAWRENCE J. FARBER, ESQ.  
CARL W. LINDLEY, JR., ESQ.  
ANTHONY M. PATURSO, ESQ.

TEL: (413) 256-8429  
FAX: (413) 256-8526

September 25, 2023

Paul Bockelman, Town Manager  
Mandi Jo Hanneke, Chair, Community Resources Committee  
4 Boltwood Avenue  
Amherst, MA 01002



Re: Residential Rental Property Proposed By-Law

Dear Mr. Bockelman and Ms. Hanneke:

Please be advised that this office represents the Amherst Landlords Association and its members. I am writing as a courtesy to give the Town an opportunity to address our concerns related to the By-law governing Residential Property and Rental Registration in the Town of Amherst. Although we had several concerns with the prior Registration By-law, the proposed extensive changes and burdens being placed on Landlords has required me to send this letter. This letter is not just stating our concerns, but putting the Town on notice that unless there are significant changes to the Residential Rental Property By-law (hereafter RRP), we will be filing a lawsuit to seek to declare the By-law against the United States Constitution, the Massachusetts Constitution and against Massachusetts law. As I am sending this letter to you prior to the RRP By-laws' passage, I have opted to not put specific caselaw in this letter, nor go into great detail supporting our positions. Instead, this is to give you sufficient understanding of the potential valid challenges that we would bring. You should discuss these positions with Town Counsel.

There are several grounds on which we find the By-law objectionable. However, I will only discuss those that relate to how the RRP By-law violates the Federal and State laws.

The way the present By-law is drafted and paid for, it constitutes a tax and not a fee for service. For you to charge Landlords a fee a few things are required: 1. It must be for a service the Landlord opts to have; 2. The person seeking a license must be able to opt out of receiving that service (and Not make the opting out equal to an illegal taking by the Town); 3. The service must be for the benefit of the persons having to pay for the service; 4. The fee must be reasonably justified for the expense being charged the license holder; and other similar tax verse fee comparisons. In the present case, the fee that is being charged does not benefit the Landlord, but instead is to protect "the safety, health, and welfare of its [Town of Amherst] residents." Clearly, this is not a bylaw seeking to provide a service for Landlords. As such, this constitutes a tax, which the Town has no right to implement or collect as there is no authority by the Commonwealth for it to do so.

BARRE OFFICE  
7 EXCHANGE STREET, P.O. BOX 843, BARRE, MA 01005  
MAIL TO AMHERST ONLY

Another significant problem is that the By-law does not recognize the rights of entities that have received special permits or have acted under prior zoning regulations that were in place at that time, or other actions that would constitute a basis for being "grandfathered" in before this By-law is passed. The simplest example of this would be the many complexes that applied for, and received, special permits to establish multi-unit housing. During the application process, the Town, at that time, had the right to put certain restrictions on the property. Once approved, the special permit holder relied upon the Town's granting of the special permit and its parameters to construct buildings or a complex that comported with that special permit. To require those same property owners to now pay to register and get approval from the Town on a yearly basis or lose the right to rent the units is inappropriate as they have already received that designation from the Town. Moreover, to refuse to grant them the right to be a rental property if they fail to file the registration would reduce their property to no value. The properties were specifically built after receiving the Town's approval to be a multi-unit residential complex. As these multi-unit buildings are in areas zoned as such, they could not be converted to other uses. This would be a clear taking under the law. As stated above, in the reference to a tax verse a fee, there is no service the Town is granting to the Landlord that it has not already granted through the special permit.

A similar argument can be made and supported for Landlord owners who built a residential house or converted a single family to a two family or multiple family home. At the time, the individual owners (whether they are people or legal entities is not relevant) were acting under the zoning by-laws as they existed at the time. Accordingly, the Town would be violating the codes as enacted at the time and committing a taking on those properties also.

Another provision that constitutes a legal concern is the part of the RRP By-law permitting the Town to perform inspections without being contacted by the tenants or Landlord. To enter a home requires either permission or probable cause that a crime is being committed (in certain instances, there may be exigent circumstances that would allow entry, but none of those fit the grounds presented in the By-law). This provision violates the Fourth and Fifth Amendment protections granted under the U.S. Constitution. This was brought to the attention of the Committee but was ignored. The Committee did amend the provision that would have created potentially conflicting inspections for government subsidy programs, but those programs are in existence due to federal or state mandates, not municipalities without an enabling statute. Even then it must be part of engaging in the state or federal program.

A similar problem exists with the restriction that the Person-in-Charge must only be a local individual who lives in Hampshire, Hampden or Franklin counties. We believe this may violate equal protection rights under the law, as well as violate the commerce clause of the U.S. Constitution. Providing the Town with contact information for a Person-in-Charge we believe achieves the Town's concern. Requiring the Owner or manager live or have their primary place of business in one of those three counties does not advance that purpose, especially without a prior finding that the individual has failed to adhere to the requirements of the State Sanitary Code or Fire Codes of the Commonwealth of Massachusetts.

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Additionally, the By-law runs afoul of the Commonwealth of Massachusetts' own constitution. Pursuant to Article 89, §7, a municipality has no power to enact private or civil laws governing civil relationships. In the By-law, the Town requires certain disclosures be made to the tenants, the Leases be kept on file and available not only to the Town's Principal Code Official, but to any person who requests a copy. Again, these requirements are being made by the Town without any authorizing statute passed by the state. This requirement may also violate the rights of contract with the management (Person-in-Charge) which is a civil relationship.

Lastly, and probably of greatest importance, is that the By-law seeks to hold owners and Landlords responsible for the actions of a third party, in this case usually the Tenant. This is clearly a violation of many laws, both civil and criminal, regarding who may be held liable for an act. The most important of which are the infringement on due process rights. To understand the absurdity of this position, one should look to what would happen if taken to its logical conclusion. This would be equivalent to holding a Landlord guilty of murder if a third party committed murder on the Landlord's property even though they had no prior notice that the person was intending to commit murder and they had not aided or abetted the committing of the crime. The Town is seeking to hold the Landlord liable even if the Landlord sent the tenant warnings or has started eviction proceedings. It is important to remember that tenants have rights to quiet enjoyment by Massachusetts law (and the U.S. Constitution). Thereunder, a Landlord may not enter the unit without permission, or in other ways interfere with a tenant's use of the property without probable cause (just like the Town may not, as discussed above when discussing the 4<sup>th</sup> and 5<sup>th</sup> Amendments). Tenants who violate noise by-laws may be held criminally liable by the Town through its police force for violating that Town ordinance on excessive noise. Similarly, if the zoning laws permit, the Town parking enforcement officer may ticket cars that are violating parking restrictions on Town property. This right of enforcement does not give the Town the right to pass that responsibility on to the Landlord under penalties of fines or revocation of their license without similar proof that the Landlord knew or could control those behaviors. Frequently, the Town's police do not bring criminal charges against the Tenants violating the noise statutes because: they may not have observed the offense themselves, could not find any individuals responsible, or could not find any individuals who were willing to testify, among many other reasons. These problems are even greater for the Landlord who does not have the resources or authority to investigate as thoroughly or convince the witness to cooperate. Moreover, the process of evicting tenants for violations of many of these provisions takes time. These days it can take much longer to get into court (a notice to quit must be given to the tenants, a summary process served after the notice period expires, a first tier (mediation) must be held -- often many weeks or months after filing -- and if the tenants do not agree to a reasonable resolution, a trial which could be weeks later, in the best cases). At a trial, the Landlord must have proof of the violation. Hearsay is not allowed. Also, many judges will give the tenants in these circumstances a second chance, especially if the hearing is held near the end of a semester, or especially, if it is near graduation. Under all of these situations, there are no grounds to hold the Landlord responsible for the actions of the tenants. We believe that there is little chance that a court will find the Town's wish to hold a Landlord or owner responsible in most of these situations. As such, any fines would most probably be stricken.

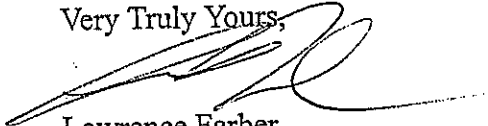
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Accordingly, as the proposed By-law presently exists the Amherst Landlords Association would legally challenge the By-law in court. To that end, we contacted the New England Legal Foundation which has expressed an interest in supporting our position if the matter requires litigation. Although we make no promises about the likelihood of reaching a consensus on a By-law and its provisions, representatives of the Amherst Landlords Association would be willing to meet with the appropriate Committee members to see if language, fees and provisions that are acceptable to both can be reached. If you wish to take the Association up on this offer, please let us know through Stephen Walczak at 413-549-0145 within two weeks. If you wish to try and resolve any of the Associations concerns, this must occur BEFORE the By-law is passed by the Town. After it is passed, we will have no option but to challenge the By-law in court.

Thank you for your attention to this matter.

Very Truly Yours,



Lawrence Farber

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